

USDOL/OALJ Reporter

[*Childers v. Carolina Power & Light Co.*](#), ARB No. 98-077, ALJ No. 1997-ERA-32
(ARB Dec. 29, 2000)

U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210



ARB CASE NO. 98-077
ALJ CASE NO. 97-ERA-32
DATE: December 29, 2000

In the Matter of:

BILLIE W. CHILDERS, JR.,
COMPLAINANT,

v.

CAROLINA POWER & LIGHT COMPANY,
RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Billie W. Childers, Jr., *Pro Se*,
Sardinia, Ohio

For the Respondent:

Douglas E. Levanway, Esq., Chad M. Knight, Esq.,
Wise Carter Child & Caraway, Jackson, Mississippi

FINAL DECISION AND ORDER

This case arises under §5851 of the Energy Reorganization Act, 42 U.S.C.A. §5851 (West 1995), and its implementing regulations at 29 C.F.R. Parts 18 and 24 (2000). Section 5851 provides a remedy for employees in the nuclear power industry who suffer employment discrimination because they complain about unsafe conditions.

After a hearing, the Administrative Law Judge (ALJ) issued a decision recommending that the claim be dismissed on its merits. No. 1997-ERA-32 (Jan. 29, 1998).¹ We have jurisdiction to review the ALJ's recommended decision and issue the final agency order

in this case pursuant to 29 C.F.R. §24.8. Our standard of review is *de novo*. 42 U.S.C.A. §5851(b)(2)(A); 5 U.S.C.A. §557(b) (West 1996).

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**I. WE ADOPT THE ALJ'S RECOMMENDED FINDINGS
OF FACT ON THE MERITS OF CHILDERS' CLAIM**

Billie Childers was fired from his job as a health physics technician at Carolina Power & Light Company (CP&L) in October 1996, after his second failure to follow proper procedures in an area known as the refuel floor caused workers to be contaminated with excess radiation. In his letter of complaint to the Department of Labor, Childers alleged that CP&L's decision to fire him for these performance deficiencies violated §5851(a)(1) because CP&L had assigned him to the refuel floor in the expectation and hope that he would misperform and give the company an excuse to fire him. According to Childers, CP&L officials orchestrated this plan in retaliation for complaints Childers made in February 1996 about his performance evaluation.

At the hearing Childers testified that his complaints about his performance evaluation concerned "personal integrity" issues such as the truth or falsity of a comment by his supervisor that Childers took for his exclusive use a tool that was meant to be shared. Childers admitted that he was transferred from the area involved in the February 1996 performance evaluation to the refuel floor during a plant-wide reorganization that was initiated by a new superintendent and that involved 90% to 95% of all technicians and supervisors. Childers admitted that he was an experienced health physics technician with experience on the refuel floor, but asserted that CP&L expected him to fail on the refuel floor because the pace on the refuel floor was more hectic than he was used to and his experience on the refuel floor was limited. Childers also testified that he believed that safety concerns he expressed about scheduling problems on the refuel floor and about his personal exposure to radiation one day in June 1996 contributed to CP&L's decision to fire him.

After an investigation, the Wage and Hour Division of the Employment Standards Administration of the Department of Labor concluded that Childers had been terminated due to unsatisfactory job performance and not in retaliation for safety complaints. Childers disputed this finding, and his claims were referred for an administrative law hearing. 29 C.F.R. §24.5.

After a full hearing, the ALJ recommended the following findings of fact: Childers' complaint about the fairness of his performance evaluation was not protected activity within the meaning of §5851 because it did not relate to the health and safety purposes of the ERA.² 42 U.S.C.A. §5801(a) ("The Congress hereby declares that the general welfare and the common defense and security require effective action to develop, and increase the efficiency and reliability of use of, all energy sources . . . to advance the goals of restoring, protecting, and enhancing environmental quality, and to assure public health and safety"). Accordingly, CP&L's reaction, if any, to that complaint was not covered by §5851. 1997-ERA-32 @ 10.

There was no support in the record for Childers' theory that his complaints about scheduling problems possibly linked to safety risks on the refuel floor influenced the company to fire him. Childers himself testified that he made the complaints to a supervisor who probably took credit for raising the issue with others and did not reveal that the idea originated with Childers. Moreover, no one involved in the decision to terminate Childers knew he had expressed concerns about safety on the refuel floor. Thus, the ALJ concluded, Childers did not make even a preliminary showing that CP&L discharged him "because" of this activity. 1997-ERA-32 @ 11; 42 U.S.C.A. §5851(a).

The fact that Childers expressed concern about four months before his discharge that his personal radiation dosage was higher than that of some other workers (albeit within legal levels) played no role in his termination. Childers' radiation dosage came down after that, and CP&L proved by clear and convincing evidence that the individuals who decided to fire Childers did so solely because of Childers' poor job performance on two separate occasions. 1997-ERA-32 @ 12.

Moreover, the ALJ pointed out, Childers was not fired until his second significant failure to perform basic job functions; the people who supposedly "set him up" for failure were the same people who decided to give him a second chance after the first incident. *Id.* @ 13.

We have independently reviewed the record, adopt the ALJ's thorough and well reasoned decision concerning the merits of Childers' complaint and attach it hereto.³

II. SUBPOENA AUTHORITY UNDER §5851

Three co-workers testified on Childers' behalf. Childers told the ALJ he wanted additional co-workers to testify but that they were unwilling to appear voluntarily.⁴ Therefore Childers requested they be subpoenaed. The ALJ denied this request on the ground that he lacked statutory authority to subpoena witnesses for a §5851 hearing. "While I agree with Mr. Childers that he and other claimants under the ERA are severely hampered by their inability to subpoena witnesses, especially in cases where the witness would be testifying against his or her current employer, I did not have the power to issue the subpoenas that Mr. Childers requested." 1997-ERA-32 @ 14. The ALJ relied on *Malpass v. General Electric Co.*, Nos. 85-ERA-38 & 39 (Sec'y Mar. 1, 1994), which stated in dictum that ALJs lack subpoena power under §5851 because §5851 does not delegate subpoena power by express terms.

Until *Malpass*, ALJs generally assumed that they had subpoena authority under §5851. See e.g., *Thomas v. Arizona Pub. Serv. Co.*, No. 89-ERA-19, note 10 (Sec'y Sept. 17, 1993). After *Malpass*, ALJs denied requests for subpoenas based on the *Malpass* dictum in whistleblower claims under the Federal Water Pollution Control Act, 33 U.S.C.A. §1367 (West 1986), and the Solid Waste Disposal Act of 1988, 42 U.S.C.A. §6971 (West

1986). *Immanuel v. Wyoming Concrete Indus.*, No. 96-022 (ARB May 28, 1997), *aff'd in part and rev'd in part sub nom. Immanuel v. United States Dep't Labor*, 139 F.3d 889 (4th Cir. 1998) (unpublished decision); *Oliver v. Hydro-Vac Servs., Inc.*, No. 97-063 (ARB Jan. 6, 1998).

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A. Stare decisis

Adherence to decisional law promotes the evenhanded, predictable and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. "Adhering to precedent is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right." *Burnet v. Coronado Oil & Gas Co.*, 258 U.S. 393, 406, 52 S.Ct. 443, 447 (1932) (Brandeis, J., dissenting). At the same time, however, *stare decisis* is not an inexorable command; rather, it "is a principle of policy and not a mechanical formula of adherence to the latest decision." *Helvering v. Hallock*, 309 U.S. 106, 119, 60 S.Ct. 444, 451 (1940). "[W]hen governing decisions are unworkable or are badly reasoned, '[the Supreme Court] has never felt constrained to follow precedent.'" *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 2609 (1991) (internal citation omitted). The reasons for reversing an earlier ruling are always *sui generis*, but if a useful generalization can be made, it is that "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved. The opposite is true in cases . . . involving procedural and evidentiary rules." *Payne*, 501 U.S. at 828, 111 S.Ct. at 2610 (internal citations omitted); *cf. Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 276, 114 S.Ct. 2251, 2257 (1994) (renouncing earlier conclusion concerning meaning of APA phrase "burden of proof" because first analysis was "cursory" and did not "withstand[] scrutiny").

Today we revisit the logic of *Malpass*, conclude that it does not withstand scrutiny, and that availability of subpoenas in §5851 enforcement hearings is sufficiently important to justify withdrawal of the *Malpass* dictum.

B. Administrative subpoenas are essential tools widely used by agencies responsible for assuring compliance with health and safety legislation

An administrative subpoena is a formal demand that instructs an individual to produce either testimonial or documentary evidence. "Beginning with the Interstate Commerce Act in 1887, it became a conventional feature of Congressional regulatory legislation to give administrative agencies authority to issue subpoenas for relevant information." *Pennfield Co. v. SEC*, 330 U.S. 585, 603, 67 S.Ct. 918, 928 (1947) (Frankfurter, J., dissenting). This is because the power to gather information that is material to effectuation of

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a statute's goals and purposes is "[t]hat power, without which all others would be in vain." *United States v. Morton Salt Co.*, 338 U.S. 632, 648, 70 S.Ct. 357, 366 (1950). *Cf. ICC v. Brimson*, 154 U.S. 447, 486, 14 S.Ct. 1125, 1137 (1894) ("[O]f all the modes that could be constitutionally prescribed for the enforcement of the regulations embodied in the interstate commerce act, [the agency power to subpoena witnesses] will protect the public against those who . . . would subject commerce . . . to unjust and unreasonable burdens").

Administrative subpoena power is generally quite broad, limited only by the Constitution and the requirement that the information being sought is relevant to the agency's statutory purpose, reasonably specific, and not unreasonably burdensome. *Morton Salt*, 338 U.S. at 642, 652, 70 S.Ct. at 363, 369; *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208, 66 S.Ct. 494, 505 (1946). "To unreasonably hamper the [agency] by narrowing the field of inquiry beyond the requirements of the due protection of rights of citizens will be to seriously impair its usefulness and prevent a realization of the salutary purposes for which [the agency] was established by Congress." *Interstate Commerce Commission v. Baird*, 194 U.S. 25, 47, 24 S.Ct. 563, 570 (1904).

C. The "express authorization" rule is not relevant to administrative subpoenas

Agencies responsible for adjudicating enforcement cases are generally authorized to issue subpoenas by the express terms of their enabling legislation. *See e.g.*, Federal Mine Safety and Health Act, 30 U.S.C.A. §§813(b), 823(e) (West 1986); Fair Labor Standards Act, 29 U.S.C.A. §209 (West 1998); National Labor Relations Act, 29 U.S.C.A. §161 (West 1998); Immigration Reform and Control Act, 8 U.S.C.A. §1324b(f)(2) (West 1999); Federal Trade Commission Act, 15 U.S.C.A. §49 (West 1997); Federal Communications Commission Act, 47 U.S.C.A. §409(e) (West 1991); Securities and Exchange Commission Act, 15 U.S.C.A. §77uuu (West 1997); the Walsh-Healey Public Contracts Act, 41 U.S.C.A. §39 (West 1987).⁴ This undoubtedly explains why the body of administrative subpoena law developed to date concerns not whether the agency needed express subpoena authority, but whether the agency employed its express authority in a manner consistent with its statutory text and purpose and with Constitutional principles. Indeed, our research has disclosed no United States Supreme Court or United States Court of Appeals decision holding that administrative subpoena power can be delegated by Congress only in express terms or conversely that agencies may not construe their statutory mandates to investigate or adjudicate as permitting use of administrative subpoenas. With one exception, which we discuss *infra*, the issue has simply not arisen in an appellate forum.

Yet, *Malpass* stated that subpoena power must be "explicitly delegated by Congress." And *Malpass* does not stand alone. Some commentators have also assumed that administrative subpoena power is delegable only by express statutory terms though none

has explained the basis for this assumption. See e.g., Edward A. Tomlinson, *Discovery in Agency Adjudication*, 1971 DUKE L. J. 89, 97 n.19, 141-142; Administrative Conference of the United States, Recommendation No. 87-2, 52 Fed. Reg. 23,629, at 23,632 (June 24, 1987) (Congress should enact omnibus whistleblower legislation that would, *inter alia*, grant subpoena power to the Secretary of Labor for whistle blowing investigations and hearings, with provision for judicial enforcement); S. REP. NO. 101-349, §IIH(1) (1990) ("The authority to issue enforceable subpoenas is essential if whistleblowers are to have meaningful hearings before the Department of Labor. * * * ACUS and the Department of Labor both recognize the need to address this problem through express statutory language to eliminate any ambiguity about the existence of subpoena power for the Secretary of Labor").

We must consider, then, the "express authorization" rule in relation to administrative subpoenas. "Express authorization" is a judge-made concept employed when application of traditional rules of statutory interpretation would result in highly unusual departures from important legal norms. For example, the Supreme Court applied the express authorization rule to bar interpretations of the National Security Act and the Armed Service Procurement Act that would have allowed the Defense Department to terminate civilian employees without the right of confrontation and cross examination. *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400 (1959). "Before we are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and wanted and has authorized their use." *Id.*, 360 U.S. at 506, 79 S.Ct. at 1419. Such a decision "must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized . . . but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." *Id.* 360 U.S. at 507, 79 S.Ct. at 1419.

Consistent with these principles, express authorization has been deemed necessary for retroactive application of statutory law. "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 114 S.Ct. 1483, 1497 (1994). Abrogation of executive, legislative and juridical immunities must be express, because the public interest is best served by such vital decision makers if they can exercise their functions with independence and without fear of personal consequences. *Nixon v. Fitzgerald*, 457 U.S. 731, 746, 102 S.Ct. 2690, 2699 (1982). Congress must be explicit if it intends American law to apply outside the territorial jurisdiction of the United States, in order "to protect against unintended clashes between our laws and those of other

nations which could result in international discord." *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248, 111 S.Ct. 1227, 1230 (1991). Congress must provide clear and convincing expressions of intent to cut off the right to judicial review of agency action, because of the long custom, embodied in the Administrative Procedure Act, of free access to the courts. *Reno v. Catholic Soc. Servs, Inc.*, 509 U.S. 43, 64, 113 S.Ct. 2485, 2499 (1993). And abrogation of sovereign immunity must be explicit in the statute because of sovereign immunity's ancient roots in Anglo-American law and the importance of the public fisc. *West v. Gibson*, 527 U.S. 212, 224, 119 S.Ct. 1906, 1913 (1999) (dissent); 18 Op. Off. Legal Counsel 52 (1994).

In the administrative subpoena context (again, under a statute that expressly authorized administrative subpoenas), the Supreme Court rejected an early interpretation of the Interstate Commerce Commission's subpoena power that would have permitted the Commission to require any person to disclose any facts, "no matter how private, no matter what their tendency to disgrace the person whose attendance has been compelled," that the Commission might find helpful as it consider a potential legislative proposal relating to commerce with foreign nations or among the several states. "We could not believe, on the strength of other than explicit and unmistakable words, that such autocratic power was given for any less specific object of inquiry than a breach of existing law, in which, and in which alone . . . there is any need that personal matters should be revealed." *Harriman v. ICC*, 211 U.S. 407, 421, 29 S.Ct. 115, 119 (1908); *cf. Ellis v. ICC*, 237 U.S. 434, 35 S.Ct. 645 (1915); *FTC v. American Tobacco Co.*, 264 U.S. 298, 44 S.Ct. 3336 (1924).

To recite the issues to which the express authorization rule has been applied is to show the rule's irrelevance to the question whether administrative subpoena power must be express. As we have seen, administrative subpoenas have been a staple of federal legislation and agency practice for more than a hundred years. To infer subpoena power from statutory authorization to investigate and enforce compliance with a statute produces anything but a departure from a legal norm. To the contrary, application of the express authorization rule would produce an anomalous result by depriving the agency of an essential and commonplace mechanism for effectuating its duty to assure compliance with the statute.

D. Statutory mandates to provide formal trial-type hearings encompass subpoena authority

Section §5851 does not merely charge the Secretary of Labor with providing hearings, it stipulates that the hearings be of the most formal type "on the record after notice and opportunity for public hearing." 42 U.S.C.A. §5851(b)(2)(A) ("An [adjudicative] order of the Secretary shall be made on the record after notice and opportunity for public hearing"). Thus, §5851 falls squarely within the category of administrative adjudications where procedural mechanisms routinely used by courts to manage the gathering of material evidence can be employed, whether mentioned in the enabling legislation or not.

The U. S. Court of Appeals for the District of Columbia Circuit has certainly suggested as much by stating that **unless** an agency is required to issue adjudicative orders on the record after notice it cannot employ evidence-gathering mechanisms like subpoenas that are traditionally part of formal trial-type proceedings. "The Civil Service Commission had no statutory obligation to examine witnesses or hold an adversary hearing, much less issue a subpoena The Commission cannot confer upon itself the power of subpoena **in the absence of a statute requiring it to hold hearings of the type involving subpoenas.**" *Johnson v. United States*, 628 F.2d 187, 193 (D.C. Cir. 1980) (emphasis added). *See also Deviny v. Campbell*, 194 F.2d 876, 879- 880 (D.C. Cir.), *cert denied*, 344 U.S. 826, 73 S.Ct. 27 (1952) (The Veterans' Preference Act "provides that 'after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings,' etc. Nothing in this statute indicates an intention to require a hearing of the adversary type, with compulsory confrontation of witnesses, etc. . . . The Commission **cannot confer upon itself the power of subpoena in the absence of a statute requiring it to hold hearings of the type involving subpoenas**") (emphasis added). *Compare Atlantic Richfield Co. v. DOE*, 769 F.2d 771, 795 (D.C. Cir. 1984) ("[O]ver the years . . . we have increasingly entrusted agencies with decision making affecting many rights and privileges hardly less important than those in discovery rulings. It seems to us incongruous to grant an agency authority to adjudicate which involves vitally the power to find the material facts and yet deny authority to assure the soundness of the fact finding. Without an adequate evidentiary sanction, a party served with a discovery order in the course of an administrative hearing proceeding has no incentive to comply, and oftentimes has every incentive to refuse to comply").

The proposition that statutory mandates to provide formal trial-type hearings encompass subpoena authority is entirely consistent with the more general proposition that formal agency adjudications should be conducted much like trials in Article III courts. "[W]hen governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative those agencies use the procedures which have traditionally been associated with the judicial process." *Hannah v. Larche*, 363 U.S. 420, 442, 80 S.Ct. 1502, 1514 (1960). "There can be little doubt that the role of the modern . . . administrative law judge within [the APA] framework is 'functionally comparable' to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions." *Butz v. Economou*, 438 U.S. 478, 513, 98 S.Ct. 2894, 2914 (1978).⁵

It is not necessary as a matter of law nor wise as a matter of policy to expect Congress to "spell[] out precisely how this authority [is] to be exercised in all the myriad circumstances that might arise" *Dow Chemical Co. v. United States*, 476 U.S. 227, 233, 106 S.Ct. 1819, 1824 (1986) (holding that Clean Air Act did not need to explicitly authorize the EPA to take aerial photos). "Regulatory or enforcement authority generally carries with it all the modes of inquiry and investigation traditionally employed or

useful to execute the authority granted." *Id. Cf. American Trucking Ass'ns v. United States*, 344 U.S. 298, 309, 73 S.Ct. 307, 313 (1953) ("All urge upon us the fact that nowhere in the [Motor Carrier] Act is there an express delegation of power to control, regulate or affect leasing practices Our function, however, does not stop with a section-by-section search for the phrase 'regulation of leasing practices [W]e might agree with appellants' contentions [that express terms are necessary] if we thought it a reasonable canon of interpretation that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected. But no great acquaintance with practical affairs is required to know that such prescience, either in fact or in the minds of Congress, does not exist").

E. An administrative subpoena is but a procedural mechanism for effectuating the legislative mandate to enforce by adjudication

Even if the congressional mandate to conduct formal trial-type hearings did not encompass authorization for subpoena use, the adjudicating agency would be entitled to use subpoenas simply by virtue of the agency's discretion to choose procedural mechanisms. "[T]he formulation of procedures [is] basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524, 98 S.Ct. 1197, 1202 (1978). This principle is "an outgrowth of the congressional determination that administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved." *FCC v. Schreiber*, 381 U.S. 279, 290, 85 S.Ct. 1459, 1467 (1965). In other words, when Congress delegates power to an agency to investigate and enforce, that delegation includes the power to resolve "subordinate questions of procedure." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138, 60 S.Ct. 437, 439 (1940).

That administrative subpoenas are merely procedural mechanisms is evident from the fact that the power to issue an administrative subpoena is not a coercive power. No matter what the agency finds out, it cannot, in the absence of any other power, use the information to do anything such as promulgate or enforce a rule, adjudicate a dispute, or otherwise "take any affirmative action which will affect an individual's rights." *Hannah v. Larche*, 363 U.S. at 441, 80 S.Ct. at 1514.

Further, warrants, which are used for purposes far more intrusive than those of subpoenas as they serve as the procedural mechanism for government entry and search of private premises, have not been subjected to an express authorization requirement. For example, the Supreme Court ruled that the Occupational Safety and Health Act mandate to

OSHA to "enter without delay and at reasonable times any factory, plant, establishment . . . or environment where work is performed . . . and to inspect and investigate," 29 U.S.C.A. §657(a) (West 1999), could be enforced only if the agency had consent or a valid warrant yet the word "warrant" does not appear in the statutory provision. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816 (1978). Cf. *Almeida- Sanchez v. United States*, 413 U.S. 266, 93 S.Ct. 2535 (1973) (construing section of INA that authorized certain automobile searches to require warrant or consent); *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211 (D.C. Cir. 1981), *cert. denied*, 446 U.S. 940, 102 S.Ct. 1432 (1982) (assuming that INS was free to apply for a warrant in order to execute its statutory authority to enter premises to investigate possible statutory violations). If a warrant is a procedural device available to the agency when helpful, it must follow that a subpoena is a procedural device available to the agency when helpful. Cf. *Atlantic Richfield*, 769 F.2d at 795-796 (holding that statutory authorization to hold informal adjudications over price control violations encompassed authority to punish parties who refused to comply with discovery: "such sanctions need not be authorized *eo nomine* in the Secretary's enabling statute").

We note that the ERA does expressly delegate subpoena authority to the Nuclear Regulatory Commission in the conduct of its hearings, including NRC hearings that pertain to retaliation against whistleblowers. 42 U.S.C.A. §2201(c) (West 1994) ("[T]he Commission is authorized to administer oaths and affirmations, and by subpoena [sic] to require any person to appear and testify, or to appear and produce documents, or both" at Commission hearings).⁶ Ordinarily, this would be strong evidence that Congress intended to limit subpoena power to Commission proceedings under §2201(c). It would seem reasonable to regard the different treatments as deliberate and purposeful. In point of fact, however, the developmental history of the Energy Reorganization Act precludes such reasoning. Section 2201(c) has been part of the Energy Reorganization Act and its predecessor, the Atomic Energy Act, since 1954. 68 Stat. 948. Section 5851 was added to the ERA in 1978 for the sole purpose of providing a remedy to nuclear industry whistleblowers, since the NRC's authority over illegal retaliation did not include authority to remedy the harm to the victims of retaliation. Pub. L. 95-601, 92 Stat. 2947. Moreover, the 1978 legislation was focused primarily on amendments to other provisions of the ERA; §5851 was not regarded as controversial or its text problematic. *See e.g.*, S. REP. NO. 95-848 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7303 ("This amendment is substantially identical to provisions in the Clean Air Act and the Federal Water Pollution Control Act. The legislative history of those acts indicated that such provisions were patterned after the National Labor Management Act [now the National Labor Relations Act] and a similar provision in Public Law 91-173 relating to the health and safety of the nation's coal mines").⁷ The legislative history of §5851 is silent on the question of subpoena power. Given the 24-year interval between enactment of §2201 and §5851 and the extensiveness and complexity of the ERA in its entirety to which whistleblower protection plays only a supporting role it is not reasonable to impute significance to the linguistic difference at issue here.

F. Agency lack of contempt power is irrelevant

Malpass suggested that the fact that the ALJ would not be able to punish noncompliance with subpoenas by contempt sanctions, *i.e.*, monetary fines or imprisonment, bears on the question of subpoena power *ab initio*. There is, however, no connection between the question whether an agency has subpoena power and the fact that agencies lack power to impose civil or criminal contempt sanctions for noncompliance with agency subpoenas. As the law has developed thus far, even agencies that have express subpoena authority lack power to impose contempt sanctions. *See generally*, 7 Op. Off. Legal Counsel 128 (1983). Any agency that concludes contempt sanctions are necessary to compel the appearance of a witness or production of documents must petition for enforcement of its subpoena in the appropriate United States District Court. If the Court concludes that the information being sought is relevant to the statutory purpose, is reasonably identified, compliance is not unreasonably burdensome, and no constitutional principles are being violated, it must order the subpoenaed party to comply. Continued failure to testify or produce after issuance of the court order is no longer noncompliance with the agency subpoena, but is now noncompliance with a court order subject to criminal or civil contempt sanctions. *See generally*, *Hannah v. Larche*, 363 U.S. at 420, 80 S.Ct. at 502; *Morton Salt*, 338 U.S. at 640-641, 70 S.Ct. at 363.⁸

G. Appellate decisions do not support an express authorization requirement

In an unpublished decision relying on *Malpass*, the Fourth Circuit ruled that an ALJ lacked subpoena authority under the whistleblower provision of the Federal Water Pollution Control Act, 33 U.S.C.A. §1367 (West 1986) (the FWPCA). *Immanuel v. United States Dep't Labor*, 139 F.3d 889 (unpublished table decision) (4th Cir. 1998), 1998 WL 129932. Section 1367(b) of the FWPCA provides, in relevant part, that the parties involved in a whistleblower complaint are entitled to a hearing and that "[a]ny such hearing shall be of record and shall be subject to section 554 of Title 5." In other words, the whistleblower provisions of the FWPCA and §5851 of the Energy Reorganization Act both require that enforcement proceedings be adjudicated in formal trial-type hearings.

The *Immanuel* court reasoned that administrative subpoenas must be authorized by express terms in the enabling legislation because §§555(d) and 556(c)(2) of the APA state that agencies may issue subpoenas in adjudications when "authorized by law." 5 U.S.C.A. §555(d) (agency subpoenas "authorized by law shall be issued to a party on request"); 5 U.S.C.A. §556(c)(2) (providing that, subject to published rules of the agency and within its powers, employees presiding at administrative hearings may issue subpoenas "authorized by law"). The court apparently assumed that the term "authorized by law" means "authorized by express statutory terms": "unless the [F]WPCA specifically provides for the issuance of subpoenas by administrative hearing officers, the ALJ does not have the authority to issue them." *Immanuel*, 1998 WL 129932 **5.

"Authorized by law" is clearly not the same as "authorized by explicit statutory text." Nor do the words "law" and "statute" represent interchangeable concepts. BLACK'S LAW DICTIONARY 889, 1420 (7th ed. 1999). And the term "law" most emphatically cannot stand in for "express statutory text," as the Seventh Circuit has pointed out: "[t]he APA requirement of legal authorization does not clearly require Express [sic] statutory authority. * * * [S]tricter standards requiring express legislative authorization have only been applied to novel assertions of agency power." *Uniroyal, Inc. v. Marshall*, 579 F.2d 1060, 1066-1067 (7th Cir. 1978) (holding that the detailed enforcement scheme and broad investigative powers established by Executive Order 11246 (which prohibits discrimination based on race, creed, color or national origin) impliedly authorized the Secretary of Labor to adopt discovery rules for the interval between investigation and hearing).

Moreover, the phrase "as authorized by law" in §§555(d) and 556(c)(2) serves important purposes unrelated to the question whether or on what basis the agency has power to issue the subpoena in the first place. As discussed previously in this opinion, agency subpoenas must be related to the underlying statute's purposes, be reasonably specific and not unreasonably burdensome, and not in violation of constitutional rights. Further, the agency must have published rules for issuance of subpoenas, and have followed those rules in issuing the subpoena. 5 U.S.C.A. §556(c) ("Subject to published rules of the agency and within its powers, employees presiding at hearings may * * * (2) issue subpoenas [sic] authorized by law . . .").⁹

The *Immanuel* court goes on to rule that, despite lack of express subpoena power, the ALJ could compel the appearance of employees for the complainant under 29 C.F.R. §18.29(a)(3) ("In any proceeding under this part the administrative law judge shall have all powers necessary to the conduct of fair and impartial hearings, including, but not limited to [power to] compel the production of documents and appearance of witnesses in control of the parties"). But this reasoning elevates form over substance. As mentioned earlier, an administrative subpoena is a formal demand that instructs an individual to produce either testimonial or documentary evidence. In other words, power to issue a subpoena and power to compel testimony by order are functionally equivalent. The difference between issuance of a "subpoena to appear" and an "order to appear" is, under Part 18, that the former is usually "issued" by counsel for a party, whereas the latter is issued by the ALJ. But the underlying power of command under threat of enforcement action in federal district court is the same for both. 29 C.F.R. §18.24(d) ("Upon the failure of any person to comply with an order to testify or a subpoena, the party adversely affected by such failure to comply may, where authorized by statute or by law, apply to the appropriate district court for enforcement of the order or subpoena"); §18.29(b) ("If any

person . . . disobeys or resists any lawful order or process, or neglects to produce, after having been ordered to do so . . . or refuses to appear after having been subpoenaed . . . the administrative law judge responsible for the adjudication, where authorized by statute or law, may certify the facts to the Federal District Court having jurisdiction in the place in which he or she is sitting to request appropriate remedies"). There is no logic to the proposition that a command to appear or produce expressed in a document called a "subpoena" must be expressly authorized, but that a command to appear or produce by means of an ALJ order need not be expressly authorized. *Cf. Morton Salt*, 70 S.Ct. at 367, 338 U.S. at 648-649 (the statutory authority for issuance of an administrative subpoena did not, in fact, use the word "subpoena," but instead used "to require, by general or special orders").

H. Remand is unnecessary because the testimony Childers sought could not alter the outcome of this case

As we explained at the outset of this decision, Childers' complaint against CP&L is that the company transferred him into the refuel area of the plant hoping he would make mistakes there and give the company an excuse to fire him. According to Childers the company did this in retaliation for complaints he made about "integrity" issues in his performance evaluation. However, the overwhelming weight of the record evidence, including Childers' own testimony, shows that the company's real reason for firing Childers was that for a second time in a short period he committed serious derelictions of duty that endangered other employees.

Consistent with his theory of the case, Childers told the ALJ at the beginning of the hearing that he wished he could subpoena additional co-workers "to get their opinions of how things are run at the plant" Childers then questioned the co-workers who did appear on his behalf about his reputation for honesty and whether he, Childers, was adequately trained for work on the refuel floor. Childers never again referred to a need for additional witnesses, and nothing in his own testimony or in his examination of any of the witness indicates that the additional testimony from co-workers could have materially aided him in establishing that CP&L's decision to fire him was influenced by protected activity. *Cf. Fleshman v. West*, 138 F.3d 1429, 1433 (Fed. Cir.), *cert. denied*, 119 S.Ct. 371 (1998) (remand unnecessary when it is clear that agency would have reached the same result had it applied correct reasoning); *FEC v. Legi-Tech, Inc.* 75 F.3d 704 (D.C. Cir. 1996) (remand is an unnecessary formality where the outcome on remand is clear).

Finally, to the extent to which Member Brown's opinion diverges from the majority opinion, we expressly disavow it.

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ACCORDINGLY, the ALJ's recommended decision on the merits is adopted as our own and attached hereto. The ALJ's ruling that he lacked subpoena power under the ERA is rejected, and the complaint is dismissed.

SO ORDERED.

PAUL GREENBERG

Chair

CYNTHIA L. ATTWOOD

Member

E. Cooper Brown, Member, concurring in part and dissenting in part:

I concur in the majority's conclusion that the ERA implicitly empowers the ALJ with subpoena authority necessary to compel the attendance of witnesses at hearing. I write separately on the nature of the subpoena authority found within the ERA out of concern that the majority's discussion on this subject will inadvertently lead to abuse by litigants of that authority.

The conclusion that the authority to issue witness subpoenas is implicit in the ERA does not fully resolve the question of whether an ALJ is thus required to issue such subpoenas when requested by a litigant. A determination must be made, applying the test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), as to whether due process compels issuance of the requested subpoenas in the particular case before the ALJ. In the instant case the record before this Board on appeal is inadequate for purposes of making that determination. I thus dissent from the majority's ultimate resolution of the present appeal, as I am of the opinion that before a final ruling on the merits can be made, the case should be remanded to the ALJ to afford Mr. Childers the opportunity to demonstrate why, consistent with *Mathews v. Eldridge*, his requested witness subpoenas should have been issued.

I.

Citing *Malpass v. General Electric*, 85-ERA-38&39 (Sec'y, Mar. 1, 1994), the ALJ in the instant case held that under 5 U.S.C. §556(c)(2) he was not permitted to subpoena witnesses to testify at the hearing absent express statutory authorization which the ERA did not provide. RD&O at 13. As here explained, the ALJ's reliance upon the Secretary's commentary in *Malpass* was misplaced.

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Consistent with 5 U.S.C. §556(c)(2) of the Administrative Procedure Act, 29 C.F.R. §18.24(a) authorizes the presiding ALJ to "issue subpoenas as authorized by statute or law." *See also* 29 C.F.R. §18.29(a)(4). In previous decisions addressing the authority of the ALJ and/or Secretary to issue subpoenas, both the Secretary and the Board have construed this language to preclude the issuance of subpoenas in the absence of express statutory authority, and determined that such authority was not to be found in the ERA or other environmental whistleblower protection statutes. *See Oliver v. Hydro-Vac Services*,

91-SWD-1, ARB Case No. 97-063 (ARB, Jan. 6, 1998); *Immanuel v. Wyoming Concrete Indus.*, 95-WPC-3, ARB Case No. 96-022 (ARB, May 28, 1997), *aff'd in part and rev'd in part sub nom. Immanuel v. U.S. Dep't of Labor*, 139 F.3d 889 (4th Cir. 1998) (unpublished decision); *Malpass v. General Electric*, *supra*.

The court decisions previously relied upon by the Secretary and Board for the proposition that subpoena authority must be expressly provided by statute involved agency *investigatory* subpoenas. *See e.g., U.S. ex rel Richards v. De Leon Guerrero*, 4 F.3d 749, 754 (9th Cir. 1993) ("The authority of an administrative agency to issue subpoenas for investigatory purposes is created solely by statute."); *Equal Employment Opportunity Commission v. Children's Hospital Medical Center*, 719 F.2d 1426, 1428 (9th Cir. 1983) (finding an express Congressional grant to the EEOC of subpoena authority in aid of its investigatory authority under 42 U.S.C. §2000e). However, the nature of the government action, the interests at stake, and the rights to be protected are different in an agency adjudicatory or quasi-adjudicatory proceeding.¹ Consequently, reliance on this case authority is misplaced when the question is whether an agency has authority to issue discovery and/or hearing subpoenas as part of such a quasi-adjudicatory proceeding.

"The APA requirement of legal authorization [for issuance of discovery subpoenas] does not clearly require *express* statutory authorization." *Uniroyal v. Marshall*, 579 F.2d 1060, 1066 (7th Cir. 1978). "On occasion, agency subpoena power is not specifically spelled out in the statute. Instead, the courts have interpreted other powers granted the agency (such as rulemaking) as giving rise to an implied subpoena power." *United States v. Hill*, 694 F.2d 258, 267 n.29 (D.C. Cir. 1982), *citing* Mezones, Stein & Gruff, *Administrative Law* §21.02[2][a]. Consistent with this line of authority, the courts have acknowledged that the power of an agency to conduct adjudicatory, trial-type hearings gives rise to an implied power on the part of the agency to issue subpoenas compelling the attendance of witnesses. *See Johnson v. United States*, 628 F.2d 187, 193 (D.C. Cir. 1980); *Deviny v. Campbell*, 194 F.2d 876, 880 (D.C. Cir. 1952).

Consistent with the ERA statutory mandate that hearings be "on the record," 42 U.S.C. §5851(b)(2)(A),² the Secretary and the Board have recognized that an ALJ hearing in an ERA whistleblower proceeding constitutes a formal adjudicatory hearing which is to be conducted in

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accordance with the APA requirements found at 5 U.S.C. §§ 554, 556 and 557.³ 29 C.F.R. §18.26. *See Timmons v. Mattingly Testing Services*, 95-ERA-40, ARB Case No. 96-027 (June 21, 1996). *See also* Stephen M. Kohn, *Concepts and Procedures in Whistleblower Law*, Quorum Books, 2001, at pp. 150 *et seq.* From this I conclude, as does the majority, that implicit in the authority of the ALJ under the ERA to conduct formal, trial-type adjudicatory hearings is the authority of the ALJ to issue witness subpoenas such as those sought by Mr. Childers in the instant case.

II.

Case law confirms that an agency subpoena has no legal effect until it is enforced by a court. See e.g. *United States v. Sturm, Ruger & Co.*, 84 F.3d 1, 3 (1st Cir. 1996). However, the "federal courts have drawn a sharp distinction between agency power to issue subpoenas and judicial power to enforce them." *United States v. Hill*, 694 F.2d at 263. Wholly separate and apart from the question of whether the ALJ has the authority to issue a subpoena in an environmental whistleblower case is the question of the court's power to enforce the subpoena once issued.⁴ The latter is an issue properly reserved to the jurisdiction of the courts to decide. Thus it is not necessary to address this question in order to conclude that as a matter of law an ALJ has the necessary authority under the ERA to issue subpoenas in the first instance.⁵

III.

To conclude that the ALJ is authorized under the ERA to issue subpoenas for the attendance of witnesses at hearing is not, however, the end of the matter. Given the basis for the ALJ's authority, the question must also be resolved as to whether the ALJ should issue the requested subpoenas *in the instant case*. While the ALJ's authority for issuance of witness subpoenas is found implied in the adjudicatory, trial-type proceeding authorized under the ERA, the nature of the constitutionally-protected rights of the litigants before the ALJ, particularly to procedural due process, is determinative of whether witness subpoenas are to be issued upon the request of a litigant.

Due process does not afford parties the right to have subpoenas issued in all cases. Based on the facts before the ALJ, particularly some level of showing by the party requesting issuance of the subpoenas,⁶ the ALJ must make a determination, applying the test set forth in *Mathews v. Eldridge*, 424 U.S. at 334-35, of whether due process requires issuance of the subpoenas in the instant case.

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Within the context of the ALJ proceedings under the ERA, Mr. Childers clearly has a property interest protected by due process. *Johnson v. U.S.*, 628 F.2d 187, 194 (D.C. Cir. 1980). *Accord Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538-39 (1985). Cf. *Brock v. Roadway Express*, 481 U.S. 252, 261 n.2 (1987) (right of employer to discharge employee for cause constituted protected property interest). However, the presence of a right to due process under the Fifth Amendment only requires that a party receive his "due" process; it does not require that every procedural device that the party may claim or desire, including the issuance of witness subpoenas, be provided. "Under the line of cases beginning with *Goldberg v. Kelly* . . . our determination of what process is due depends upon an analysis and weighing of three factors: [1] the nature of the benefit or status of which the individual is being deprived; [2] the need for the government to act efficiently and expeditiously in terminating this type of benefit or status; and [3] the extent to which the decision making process would be aided by the

presence of the procedural safeguard that the individual seeks." *Johnson v. U.S.*, 628 F.2d at 194, citing *Mathews v. Eldridge*, *supra*.

Thus, before it can be concluded that witness subpoenas should have issued in the instant case, a determination must be made consistent with the test in *Mathews v. Eldridge* as to whether due process compels such a result. Required is a balancing of:

[T]he private interest that will be affected by the official action; . . . the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335. *See also Connecticut v. Doehr*, 501 U.S. 1, 11 (1991) (adjusting the interests of the government to take into consideration the interests of the party seeking the remedy).²

As mentioned in my introductory comment, the Board cannot make the foregoing determination based on the appellate record that is presently before us. Consequently, I am of the opinion that the case must be remanded to the ALJ to permit him to make the determination as to whether due process dictates issuance of the requested subpoenas -- but only after Mr. Childers has been afforded an opportunity to demonstrate why, consistent with *Mathews v. Eldridge*, his requested witness subpoenas should in the instant case be issued.

E. COOPER BROWN
Member

[ENDNOTES]

¹ References to ALJ Recommended Decisions and Orders are to opinions as published on the Department of Labor's World Wide Web site www.oalj.dol.gov. In this decision we use the OALJ citation format set forth at www.oalj.dol.gov/cite.htm.

² The whistleblower protection provision at §5851 of the Energy Reorganization Act itemizes the kinds of employee activities that are "protected activities" for purposes of §5851 claims:

(a) (1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--

(A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. § 2011 *et seq.*);

(B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954 [42 U.S.C.A. §2011 *et seq.*], if the employee has identified the alleged illegality to the employer;

(C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954 [42 U.S.C.A. §2011 *et seq.*];

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. §2011 *et seq.*], or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(E) testified or is about to testify in any such proceeding or;

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. §2011 *et seq.*].

42 U.S.C.A. §5851(a)(1).

"The Secretary may determine that a violation of subsection (a) of this section has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint." *Id.* at §5851(b)(3)(C).

³ On February 25, 1998, the Board issued a briefing schedule in this case: "Complainant may file an initial brief not to exceed 30 double spaced typed pages on or before March 26, 1998. Respondent may file a reply brief, not to exceed 30 double spaced typed pages, on or before April 27, 1998. Complainant may file a rebuttal brief . . . on or before May 12, 1998." On March 25, 1998, the Board received from Complainant a package of material including cassette tapes, a video tape, and assorted documents such as statements prepared by the Complainant in 1997 and a transcript of a Nuclear Regulatory Commission proceeding. The package contained no cover letter or indication whether copies had been served on CP&L. CP&L made no response to the Briefing Order either to say that it would rest on its submissions below or to file a brief. In light of the parties' failure to take advantage of their opportunity to brief the case before the Board, we issue this decision today without benefit of the parties' briefs.

⁴ Counsel for CP&L asserted that the company did nothing to discourage Childers' co-workers, and that those who called CP&L about the possibility of testifying in this case were told it was their "personal choice" and that the company would not dock their pay. The ALJ found the representations of CP&L's counsel to be credible. 1997-ERA- 32 @ 14.

⁴ Other statutes create agency programs that are implemented by the agency in all respects except enforcement litigation, which the statute places within the jurisdiction of

United States District Courts. Under these statutes, the litigants automatically have access to subpoenas simply by virtue of the fact that U.S. District Courts have inherent subpoena power. Examples of such statutes include the Americans With Disabilities Act, 42 U.S.C.A. §12117 (West 1995); Title VII, 42 U.S.C.A. §2000e-5 (West 1994); and Rehabilitation Act §504, 29 U.S.C.A. §794 (West 1999).

[USDOL/OALJ Reporter Editor's note: The slip opinion contains two footnote fours]

⁵ *Economou* held that an agency attorney who arranges for presentation of evidence on the record in an agency adjudication is absolutely immune from suit based on introduction of such evidence because the agency attorney performed functions analogous to those of a prosecutor. The statement that ALJs "may issue subpoenas" was not a holding in the case. It was part of a general discussion making the point that an ALJ is comparable to a judge, that an agency adjudication is comparable to a trial, and that the agency official who tries the case is comparable to a prosecutor. Thus, *Economou* is useful to our discussion here as an example of the common understanding that procedures in agency adjudications and in trials will be roughly comparable.

⁶ The Atomic Energy Commission and its successor the NRC have authority to prohibit whistleblower retaliation by covered employers and to force employers who engage in prohibited retaliation to stop their illegal practices and to correct safety hazards identified by whistleblowers. 63 Fed. Reg. 57,324 (Oct. 27, 1998).

⁷ Both the National Labor Relations Act, 29 U.S.C.A. §161, and the Federal Mine Health and Safety Act, as amended, 30 U.S.C.A. §823(e) expressly authorize use of subpoenas in agency adjudications. However, the legislative history of these acts gives no indication that in drafting those laws Congress gave any special consideration to the question of subpoena power. Thus, we draw no inferences about subpoena power from the fact that a subsequent Congress briefly mentioned the National Labor Management Act and the Federal Mine Safety Act in connection with §5851.

⁸ The statutes that expressly authorize subpoenas for agency adjudications also specify the U.S. District Court with jurisdiction to enforce the agency's subpoena. However, that is not a necessity. District Courts with *in personam* jurisdiction over the subpoenaed party would have jurisdiction over the agency's petition for enforcement of its subpoena under 28 U.S.C.A. §1331 (West 1993) (general federal question) or 28 U.S.C.A. §1337(a) (West 2000) (commerce clause legislation) or 28 U.S.C.A. §1345 (West 1993) (actions commenced by a federal agency). "We have found no cases squarely holding that these provisions [§§1331 and 1337] empower the district courts to enforce administrative subpoenas; nevertheless, we have no doubt that subpoena enforcement proceedings fall within the scope of one or all of these broad grants of subject matter jurisdiction." *United States v. Hill*, 694 F.2d 258, 267 (D.C. Cir. 1982).

⁹ The most specifically applicable Department regulations for §5851 do not provide for issuance of subpoenas. 29 C.F.R. Part 24. However, the Department's general Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. Part 18, which supplement Part 24, set forth specific procedures

for issuance of subpoenas "as authorized by statute or law." 29 C.F.R. §18.24(a) (issuance upon written application of a party) and §18.29(a)(4) (issuance as authorized by statute or law). Part 18 also sets forth the standards of admissibility, relevance and materiality applicable to all evidence, including evidence sought by subpoena, §§18.103, 18.104, 18.401-407, and incorporates by reference, 18.1(a), Federal Rule of Civil Procedure 45, "Subpoena."

[ENDNOTES - CONCURRENCE/DISSENT]

¹ Whether subpoena authority must be express or can be implied depends on a weighing of the nature of the authority vested in the government agency against the rights of the parties who will be affected by the exercise of that agency authority. In situations where an agency is authorized to act in a manner that might impede certain constitutionally-based rights, the courts have recognized that such right or rights dictate presumptions applicable in the construction of the agency's authority. *See e.g., Greene v. McElroy*, 360 U.S. 474, 506-507 (1959). Thus, where an agency is engaged in the conduct of a Congressionally authorized investigation there exists considerable interest in assuring that the issuance of any subpoena pursuant to that investigation is consistent with the constitutionally-protected privacy interests of the parties who are the targets of such investigation. (Justice Brandeis has characterized this right as "the right most valued by civilized men." Brandeis, J., dissenting in *Olmstead v. United States*, 277 U.S. 438, 471, at 478 (1928).) Consequently, the authority of an agency to issue investigatory subpoenas must be express if the rights of those who find themselves the subject of such subpoenas are to be protected. In cases involving agency adjudicatory authority, on the other hand, the constitutionally-protected interests and rights of the litigants, particularly to procedural due process, are of paramount concern.

² The ERA (as do other environmental whistle blower protection laws) mandates a hearing "on the record." 42 U.S.C. §5851(b)(2)(A) ("An order of the Secretary shall be made on the record after notice and opportunity for public hearing.") "'On the record' is a term of art in administrative law, meaning a full trial-like proceeding pursuant to Sec. 556 of the [A.P.A.], where the agency's decision is based solely upon papers filed in the proceeding and evidence adduced at the hearing and thereby made part of the record." *Old Republic Insurance Co. v. Federal Crop Insurance Corp.*, 947 F.2d 269, 277 (7th Cir. 1991) (citing 2 K. Davis, *Administrative Law* Sec. 10.7 (2d ed. 1979)).

³ The provisions of 5 U.S.C §§ 554, 556 and 557 apply "in every case of adjudication required by statute to be determined on the record after opportunity for agency hearing . . ." 5 U.S.C. §554(a).

⁴ This is also an issue separate and apart from the question of whether and to what extent the ALJ can impose sanctions short of resort to the courts for enforcement. *See Atlantic Richfield v. D.O.E.*, 769 F.2d 771 (D.C. Cir. 1984), wherein the Circuit Court for the District of Columbia noted that where an agency acts in an authorized judicial or quasi-judicial capacity, that authority necessarily encompasses the power "to take such procedural actions as may be necessary to maintain the integrity of the agency's

adjudicatory proceedings" including, for example, the issuance of evidentiary sanctions such as the preclusion of evidence and drawing of adverse evidentiary inferences. 769 F.2d at 794-795. "It seems to us incongruous to grant an agency authority to adjudicate - which involves vitally the power to find the material facts - and yet deny authority to assure the soundness of the fact-finding process." *Id.* at 795. Such sanctions need not be authorized *eo nomine* in the agency's enabling statute. *Id.*

⁵ Had the Board jurisdiction to decide the enforceability of such subpoenas once issued, I would conclude that they were enforceable. Clearly, in applying to the district courts for enforcement pursuant to 29 C.F.R. §18.24(d) and/or §18.29(b), the district courts would have authority to enforce the subpoena pursuant to 28 U.S.C. §§ 1331, 1337(a) and/or 1345. *See United States v. Hill et al.*, 694 F.2d at 267. ("[W]e have no doubt that subpoena enforcement proceedings fall within the scope of one or all of these broad grants of subject matter jurisdiction. . . . [E]ach of the provisions is clearly sufficient to confer subpoena enforcement jurisdiction."). *See also* 18 U.S.C. §1505 (criminal sanctions for obstruction of agency proceedings).

⁶ "The test for the relevancy of an administrative subpoena, whether adjudicative or investigative, is whether the information sought is 'reasonably relevant' to the agency's inquiry. [*citing, inter alia, F.T.C. v. Browning*, 435 F.2d 96, 102 (D.C. Cir. 1970) (adjudicative subpoena)]. There is, of course, a difference in that the relevancy of an investigative subpoena is measured against the 'general purposes of [the agency's] investigation,' [citations omitted], while the relevancy of an adjudicative subpoena is measured against the charges specified in the complaint. [citations omitted]. But both instances are governed by the same standard, reasonable relevance." *F.T.C. v. Anderson*, 631 F.2d 741, 745-46 (DC Cir. 1979) (involving adjudicative subpoena). *Accord*, 29 C.F.R. §18.14(b) ("It is not ground for objection that information sought will not be admissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.").

⁷ *See* Stephen Smith, "Due Process and the Subpoena Power in Federal Environmental Health and Safety Whistleblower Proceedings," 32 *University of San Francisco Law Review* 533 (1998), for a thorough discussion of the application and weighing of these factors where subpoenas are sought in environmental whistleblower proceedings.